MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-184

J. EDWIN LAVALLEE, Warden, Clinton Correctional Facility, Dannemora, New York,

Petitioner,

against

JAMES W. ROGERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner J. Edwin LaVallee, Superintendent (Warden) of Clinton Correctional Facility, Dannemora, New York, prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, dated May 15, 1975, which granted respondent's application for a writ of habeas corpus. The decision reversed the judgment of the United States Court for the Northern District of New York, dated August 29, 1974, which denied the application.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is reproduced herein as Appendix "A". The opinion of the District Court is not reported and is reproduced herein as Appendix "B".

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on May 15, 1975. A timely petition for rehearing *in banc* was denied on July 18, 1975.

Question Presented

Does *Ashe* v. *Swenson,* 397 U.S. 436 (1970), permit a federal court to set aside a state judgment of conviction after the state court examined the entire verdict of the first trial and determined what issues had been decided there?

Statement of the Case

A. Facts

In 1969 respondent was indicted by a Kings County grand jury in connection with the abduction, sexual abuse, and death of an eighteen month old baby girl. The portions of the indictment at issue charged him with two counts of kidnapping in the first degree. Count three charged him, under N.Y. Penal Law 135.25(2)(a), with abduction plus restraint for more than twelve hours with intent to physically injure or sexually abuse [hereinafter abduction plus sexual abuse]. Count four charged him, under N. Y. Penal Law 135.25(3), with abduction when the victim dies during the abduction or before his return to safety [hereinafter abduction plus death].*

After several weeks of testimony, the jury was charged. The trial court instructed that the jurors could consider respondent's guilt of kidnapping in the second degree, simple abduction (N. Y. Penal Law § 135.20), under both

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* The first two counts charged felony murder and intentional murder. Petitioner was acquitted of these charges and they are not at issue.

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counts of kidnapping in the first degree. That is, the Court charged on count three, abduction plus sexual abuse, and then stated that the jury could consider simple abduction if they found respondent innocent of the primary charge. The Court then charged on count four, abduction plus death, and again instructed that simple abduction should be considered if the jury found respondent innocent of the main charge. At no point during the charge did respondent's counsel raise any objection; when asked if there were any objections or requests, he replied no.

The jury deliberated for the rest of the day and resumed deliberations the next morning. Obviously confused by the charge, the jury twice requested that the Court explain the two degrees of kidnapping and the Court did so. The jury then returned with a verdict of acquittal on the murder counts and on the third count as to both first and second degree kidnapping (abduction plus sexual abuse and simple abduction).

In the same breath, however, the jury also announced that it was deadlocked as to first and second degree kidnapping (abduction plus death and simple abduction) under the fourth count. Pursuant to the Court's direction they returned for further deliberations and they again returned deadlocked. The judge then found that they did not agree, discharged the jury, and restored the fourth count of the indictment to the trial calendar. Respondent's counsel raised no objection to the discharge or to the restoration of the fourth count.

Respondent later moved in the Appellate Division to prohibit his retrial on the fourth count on double jeopardy grounds. The motion was denied and again denied at the retrial. Respondent was retried on the fourth count (abduction plus death) and found guilty of kidnapping in the first degree after a trial by jury in the Supreme Court, County of Kings. He was sentenced to twenty years to life imprisonment on July 14, 1970. The judgment of con-

viction was affirmed without opinion (36 A D 2d 1024 [2d Dept. 1971]); leave to appeal to the Court of Appeals was denied; and certiorari was denied. 405 U.S. 956 (1972). Respondent is confined pursuant to this conviction.

B. Prior Proceedings

Respondent then applied to the federal court for a writ of habeas corpus claiming that his second trial was prohibited because 1) he was acquitted of second degree kidnapping (simple abduction) under count three at his first trial and could not later be tried for kidnapping on the first degree (abduction plus death) since simple abduction was a necessary element of kidnapping in the first degree and had already been resolved in his favor and 2) that a mistrial was improperly declared at his first trial.*

Respondent's first federal habeas corpus petition was denied by the United States District Court for the Northern District of New York on August 31, 1971. On appeal the Court of Appeals ordered the petition dismissed for failure to exhaust. *United States ex rel. Rogers* v. *LaVallee,* 463 F. 2d 185 (2d Cir. 1972). At that time the Court stated that the "crime involved is so repulsive, the issue of state-federal relationship so delicate, and the double jeopardy claim so unusual and not without difficulty" that exhaustion would be required. *Id.* at 187.

Respondent then raised his claim in the state courts. The trial court held that the verdict of the jury must be considered in its entirety; the verdict of not guilty under count three could not be isolated and considered separately from the remainder of the verdict.** The Court

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* This second claim was raised on appeal but was not reached by the Court of Appeals in light of its resolution of the first claim.

** The unreported opinion of the trial court in respondent's post-conviction proceeding is unreported and reproduced herein as Appendix "C". *People* v. *Rogers,* Sup. Ct. Kings Co., February 8, 1973.

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found that "when the verdict is taken as a whole, it cannot be said that defendant was in truth and fact acquitted of abduction at the first trial." Rather, the jury rendered a confused or "repugnant" verdict under state law. Since respondent had failed to object to the mistrial and the order for a new trial on count four, a "repugnant" verdict had been allowed to stand. The Court stated that respondent should not be permitted to interpret the verdict as one of actual acquittal since this would be "pure speculation."

Respondent then re-presented his two claims to the District Court, which denied his application on August 29, 1974. The District Court agreed with the state court that the verdict must be viewed in its entirety. So viewing the verdict, the Court could not find that respondent had necessarily been acquitted of simple abduction. The District Court too noted that respondent failed to raise any objection at his trial, allowing the confused verdict to stand.

C. Court of Appeals Opinion

In a 2-1 opinion dated May 15, 1975, the Court of Appeals reversed the District Court and granted the petition. Despite the holding of the state court, the majority refused to consider the verdict of the jury as a whole. Rather, the Court stated that respondent was clearly acquitted of simple abduction under count three and refused to give any consideration to count four. Accordingly, the majority held that the state was collaterally estopped from retrying respondent for a crime which included the element of simple abduction.

In his dissent, Judge Lumbard stated the verdict was to be viewed in its entirety and that there could be no finding that the jury acquitted respondent of simple abduction. Since the trial did not terminate in respondent's favor, this case could not be distinguished from the usual situation when a retrial is permitted on the counts as to which the jury has disagreed.

Reasons for Granting the Petition for Certiorari

A. This Court should decide how *Ashe* v. *Swenson*, 397 U.S. 436 (1970) is to be implemented by the States.

This case raises the question, important to the states, of the implementation of this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970). In deciding petitioner's claim, the state court applied state law and determined that the verdict at issue must be considered in its entirety. The state court accordingly held that respondent had not been acquitted of simple abduction at his first trial and that his retrial for kidnapping in the first degree was not barred under the Double Jeopardy Clause. Is it appropriate for two judges of a federal Court of Appeals to then pass on the state conviction so as to conclude, as they did here, that there was double jeopardy?

In *Ashe* v. *Swenson, supra*, this Court held that the principle of collateral estoppel in criminal cases is embodied in the Fifth Amendment guarantee against double jeopardy and hence applicable to the states. This Court carefully pointed out that the rule of collateral estoppel is to be applied with "realism and rationality". *Id.* at 444. This approach requires that the court which examines the prior verdict must look at the *whole* record of the prior proceeding and decide if a "rational jury" could have based its verdict on an issue other than the one a defendant seeks to foreclose from further consideration. *Id.* Cf. *Sealfon* v. *United States*, 332 U.S. 75, 579 (1948).*

The state court which decided respondent's claim specifically held that the verdict at the first trial had to be

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* Both the District Court and Judge Lumbard pointed out ways in which the jury could have reached the verdict it did without actually deciding the issue of simple abduction (*post* at 11a-12a, 22a-23a).

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considered as a whole. Examination of the entire verdict is consistent with this Court's language in *Ashe* v. *Swenson, supra,* at 444. The state court also held that a confused or "repugnant" verdict under New York law had been allowed to stand and that respondent, who failed to object at trial, should not be permitted to interpret it as one of actual acquittal. To the extent that the majority of the Court of Appeals differs with the state court analysis and holding, it would appear to act as if it were exercising its supervisory authority as in *United States* v. *Gugliaro,* 501 F. 2d 68, 70-71 (2d Cir. 1974); *United States* v. *Tramunti,* 500 F. 2d 1334, 1346-49 (2d Cir. 1974), *cert. den.* —— U.S. ——, 43 U.S.L.W. 3349 (December 16, 1974); *United States* v. *Feinberg,* 383 F. 2d 60, 71 (2d Cir. 1967). Petitioner strongly urges this Court to resolve the conflict on this issue.

B. The public interest in sustaining this conviction warrants review of the Court of Appeals decision.

Although the Court of Appeals has previously held that a defendant claiming the benefit of the collateral estoppel rule must show "that the jury verdict in the prior trial *necessarily* decided the issue raised in the second prosecution" (*United States* v. *Gugliaro, supra,* at 70) (original emphasis), it has either retreated from this rule or failed to apply it in this case. There can be no finding in this case that the jury at the first trial *necessarily* acquitted respondent of simple abduction. Indeed since in the same breath and on two later occasions the jury disagreed on simple abduction and abduction plus death under count four, such a finding is speculative in the extreme, if not clearly erroneous.

The error in this case is particularly grievous to the State of New York because the decision in this case necessarily results in respondent's absolute release from state custody, with no possibility of retrial. It is well established in double jeopardy cases that considerations of fair-

ness to the public must be weighed against the defendant's interest. E.g. *Illinois* v. *Sommerville,* 410 U.S. 458, 470 (1973); *Wade* v. *Hunter,* 336 U.S. 684, 688-90.*

Respondent does not claim that there was any manipulation by the prosecution; that there was undue delay in his reprosecution; or that the prosecution had an opportunity to stengthen its case.** See *Illinois* v. *Sommerville, supra* at 469; *Downum* v. *United States,* 372 U.S. 734 (1963); *United States ex rel. Jackson* v. *Follette, supra,* at 1049.

Moreover, respondent's counsel, whose competency has never been questioned, specifically stated that he had no exceptions or requests to charge and failed to object to the verdict as rendered, the granting of a mistrial, and the restoration of the fourth count to the trial calendar. The state court found this failure significant in noting that a "repugnant" verdict was allowed to stand and that respondent should not be permitted to then interpret the verdict in his own favor. Finally, while the collateral estoppel issue was raised before the retrial, it was absent from his briefs on direct appeal. *United States ex rel. Rogers* v. *LaVallee,* 463 F. 2d at 187. Cf. *United States ex rel. Molinas* v. *Mancusi,* 370 F. 2d 601, 602 (2d Cir.), *cert. den.* 386 U.S. 984 (1967).

The proper application of *Ashe* v. *Swenson, supra,* to state convictions is an important issue to all of the states and should be resolved by this Court.

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* The majority in the Court of Appeals suggested that these cases could be distinguished because they resulted in mistrials, not in favor of the defendants. However, it cannot be said that this case resulted in respondent's favor. A mistrial was properly declared as to simple abduction and abduction plus death. In any event, there is precedent for balancing the interests involved even if the prior trial has resulted in neither an acquittal nor a mistrial on the contested issue. *United States ex rel. Jackson* v. *Follette,* 462 F. 2d 1041 (2d Cir.), *cert. den.* 409 U.S. 1045 (1972).

** In his District Court Memorandum (at 5), respondent stated that his conviction at retrial was based on "substantially the same evidence" as presented at the first trial.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York, July 31, 1975

Respectfully submitted,

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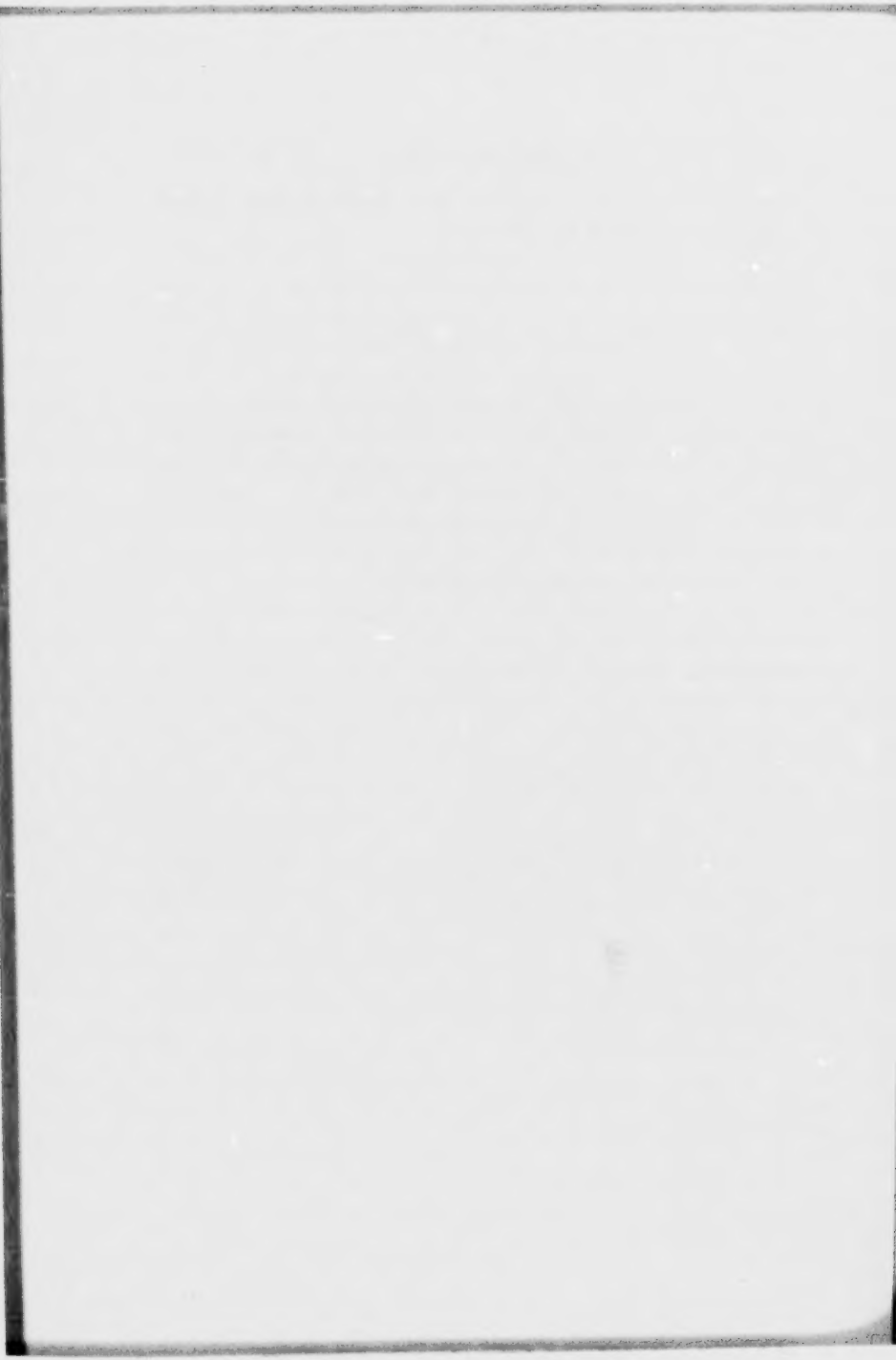

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APPENDIX A.

Decision of the United States Court of Appeals For the Second Circuit, May 15, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 752—September Term, 1974.

(Argued February 28, 1975 Decided May 15, 1975.)

Docket No. 74-2361

UNITED STATES ex rel. JAMES W. ROGERS,

Appellant,

v.

J. EDWIN LAVALLEE, Warden, Clinton Correctional Facility, Dannemora, New York,

Appellee.

Before:

LUMBARD and OAKES, *Circuit Judges,*
and BARTELS, *District Judge.**

Appendix A.

OAKES, *Circuit Judge:*

This is a double jeopardy case,[1] arising out of a state court conviction for kidnapping. The appeal is from a denial of a writ of habeas corpus by the United States District Court for the Northern District of New York, Edmund Port, *Judge*. On appellant's previous appeal to this court from such a denial, *United States ex rel. Rogers* v. *LaVallee*, 463 F.2d 185 (2d Cir. 1972), he was remanded without prejudice for failure to exhaust state remedies, a failure which now has been cured.[2] The case essentially involves the problem whether an acquittal of a lesser included offense under one count necessarily bars a subsequent prosecution when the jury fails to agree on

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1 *See* U.S. Const., Amendment V ("nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb . . ."). The protection against double jeopardy is applicable to the states under the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 793-96 (1969).

2 A post-conviction proceeding in the state court was denied by the Supreme Court, County of Kings, Damiani, *J.*, on Feb. 8, 1973, and permission to appeal the order was denied by the Appellate Division, Second Dep't, on Apr. 4, 1973. The State concedes that appellant has complied with the exhaustion requirement of 28 U.S.C. § 2254. (State's Brief at 10.)

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its verdict under another count in which the same lesser offense is also included. Put another way, the question is whether reprosecution after a mistrial following a hung jury on one count is permissible when, inconsistently but pursuant to an inconsistent and erroneous charge, there has been an acquittal on an earlier count of an element, here simple abduction, that is necessary to the later conviction, here kidnapping in the first degree.[3]

Appellant was indicted on four counts relating to the abduction, sexual abuse and death of a 16-month-old child whose body was found in a garbage can in the back of a Brooklyn, New York, supermarket. The four counts were respectively (1) felony murder, that is, a murder in the course of a kidnapping; (2) first degree (intentional) murder; (3) kidnapping in the first degree, statutorily defined as abduction with 12 hours' restraint and intent to injure or to violate the victim sexually; and (4) kidnapping in the first degree, statutorily defined as abduction with death resulting.[4]

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3 For historical exposition of the double jeopardy clause, *see* Judge Friendly's opinion in *United States* v. *Jenkins*, 490 F.2d 868 (2d Cir. 1973), *aff'd*, 43 U.S.L.W. 4309 (U.S. Feb. 25, 1975). *See also Serfass* v. *United States*, 43 U.S.L.W. 4315 (U.S. Mar. 3, 1975); Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 Harv. L. Rev. 1822 (1974).

4 N.Y. Penal Law § 135.25 (McKinney 1967) reads in relevant part:

§ 135.25 Kidnapping in the first degree

A person is guilty of kidnapping in the first degree when he abducts another person and when:

. . . .

2. He restrains the person abducted for a period of more than twelve hours with intent to:

(a) Inflict physical injury upon him or violate or abuse him sexually; or

. . . .

3. The person abducted dies during the abduction or before he is able to return or to be returned to safety.

Appendix A.

After a 19-day trial in the Supreme Court, State of New York, County of Kings, the appellant was acquitted on the first three counts and the jury was unable to agree and a mistrial was granted as to the fourth count. The rub, so far as we are concerned, is that the trial judge charged kidnapping in the second degree, that is to say, simple abduction,[5] as a lesser included offense under *both* the third count of kidnapping in the first degree and the fourth count of kidnapping in the first degree. The charge was very explicit in this regard even if very erroneous since it should have permitted the jury to consider kidnapping in the second degree only if there were an acquittal on *both* counts of kidnapping in the first. It was adhered to in one subsequent explanation after the jury had been out for some time but not mentioned as being included under both the third and fourth counts in a subsequent explanation. However, the clerk interrogated the jury after its return of a verdict of not guilty on the third count as follows:

> Court Clerk: That is the third count which charges kidnapping in the first degree. Now, still under the third count, has the jury considered kidnapping in the second degree?
>
> Foreman: Not guilty.
>
> Court Clerk: Now under the fourth count of the indictment which charges kidnapping in the first degree. What is the verdict?
>
> Foreman: Deadlocked.

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5 N.Y. Penal Law § 135.20 (McKinney 1967) reads in relevant part:

§ 135.20 Kidnapping in the second degree

A person is guilty of kidnapping in the second degree when he abducts another person.

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Appendix A.

Court Clerk: Deadlocked. Cannot agree. Now, still under the fourth count as to kidnapping under the second degree?

Foreman: Deadlocked.

The clerk questioned the jury as to lesser included offenses under the third count as he did for all four counts in the way the court originally specifically charged the jury, and, in response to the jury's first request for explanation, again specifically charged the jury, *i.e.*, to consider the lesser included offense of simple abduction if there were an acquittal under the third count. Unquestionably the jury was confused since it came back twice to ask for explanations of the charge—the first time to ask for the court's "interpretation of Kidnapping 1 and Kidnapping 2," the second time to obtain a copy of the third and fourth counts of the indictment[6] and to have the court "again explain first degree kidnapping and second degree kidnapping and the variations."

Just as clearly the jury did acquit the appellant of the offense of kidnapping in the second degree in respect to the third count. The court clerk read the verdict back as recorded after the colloquy above quoted and the foreman agreed in answer to the question "and so say you all?" The jury was then told to return to deliberation and did so but was unable to reach an agreement on the fourth count. Thereupon without objection by the district attorney and no comment by defense counsel, the court found the disagreement, on that basis discharged the jury and restored the fourth count of the indictment to the trial calendar.

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6 The court told the jury that it ordinarily would not be entitled to see the indictment, but that in this case both defense and prosecution had allowed it to be copied.

Thereafter the appellant asserted his constitutional right against double jeopardy and moved in the Appellate Division, Second Department, for a writ of prohibition to prevent his retrial on the fourth count; this motion was denied as it was upon its renewal without prejudice at trial. Appellant was retried on the fourth count (abduction plus death) and found guilty of kidnapping in the first degree after a second trial by jury in the Supreme Court, County of Kings. He is presently confined pursuant to that conviction in Clinton Correctional Facility, Dannemora, New York, on a sentence of imprisonment of 20 years to life by Justice Gittleson.[7]

It is elemental, of course, but at best only the start of our inquiry to note that "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green* v. *United States*, 355 U.S. 184, 187 (1957). *See United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (Harlan, *J.*, for the plurality).[8] In this case where there was a jury trial, jeopardy attached when the jury was empaneled and sworn. *Downum* v. *United States*, 372 U.S. 734 (1963) (discharge of jury due to witness's absence, over defendant's objection). *But see Illinois* v. *Somerville*, 410 U.S. 458 (1973) (where indictment defective, mistrial after jury

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7 His judgment of conviction was unanimously affirmed without opinion, *People* v. *Rogers*, 36 App. Div. 2d 1024, 321 N.Y.S.2d 1021 (2d Dep't 1971), leave to appeal to the New York Court of Appeals denied on July 6, 1971, *cert. denied*, 405 U.S. 956 (1972). Thus there can be no claim of constitutional bypass.

8 Justice Harlan's opinion for the plurality in *Jorn* was based on the trial court's erroneously declaring a mistrial to permit witnesses to consult with counsel and thereby abusing its discretion under the "manifest necessity" doctrine of *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824); Justices Black and Brennan felt that the action of the trial judge amounted to an acquittal.

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sworn but before evidence presented did not bar retrial); *Gori* v. *United States*, 367 U.S. 364 (1961) (retrial permissible where previous trial judge declared mistrial for benefit of defendant to prevent testimony of prior crimes). It is established in any event that "a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *United States* v. *Ball*, 163 U.S. 662, 671 (1896); *Green* v. *United States*, 355 U.S. at 188; *Illinois* v. *Somerville*, 410 U.S. at 467. This is true even though the "acquittal may appear to be erroneous." *Green* v. *United States*, 355 U.S. at 188; *United States* v. *Ball*, *supra*. *See Peters* v. *Hobby*, 349 U.S. 331, 344-45 (1955).

Historically, Judge Friendly points out, reprosecution after an acquittal was permitted if the first indictment erroneously failed to charge an offense, *e.g.*, *Vaux's Case*,[9] 4 Coke 44, 76 Eng. Rep. 992 (Q.B. 1591), but if error was committed by the lower court in the course of the trial, no matter how egregious, the defendant could plead *autrefois acquit* to a second indictment. *See United States* v. *Jenkins*, 490 F.2d 868, 871 (2d Cir. 1973), *aff'd*, 43 U.S. L.W. 4309 (U.S. Feb. 25, 1975). The principle that even egregiously erroneous trial court action that resulted in a *verdict of acquittal* would constitute jeopardy so that the defendant could not be successively prosecuted was firmly established in *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962) (retrial barred although verdict erroneously directed against Government because of lack of credibility of Government's initial witnesses and improper prosecutorial conduct). *See also United States* v. *Sisson*, 399 U.S. 267, 288-90 (1970) (after guilty verdict on will-

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9 *Compare United States* v. *Ball*, 163 U.S. 662 (1896), where it was held, after consideration of *Vaux's Case*, *supra*, that a new prosecution could not be brought after an acquittal under a defective indictment, *with Illinois* v. *Somerville*, 410 U.S. 458 (1973).

ful failure to submit to induction, action dismissed on erroneous conscientious objector grounds resulting from evidence adduced at trial—Government appeal dismissed for lack of jurisdiction). Here the state trial court was in error not only by virtue of instructions which caused the jury to consider second degree kidnapping under both Counts Three and Four but also by failure to recognize the inconsistency between the verdict of acquittal for both first and second degree kidnapping under Count Three and the inability to agree on both first degree and second degree kidnapping under Count Four. The State, by failing to object to the charge or to the form of the verdict as rendered, was equally at fault.

Judge Port below held for the State that the jury's disagreement as to Count Four was entitled to at least as much weight as the acquittal under Count Three, so that the end result was no more than a confused, inconsistent and repugnant verdict. And he relied upon our recent decisions that inconsistent jury verdicts simultaneously rendered are the jury's prerogative. *United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3239 (U.S. Oct. 22, 1974) (not guilty verdict on conspiracy count does not foreclose guilty verdict on substantive count rendered later in deliberations). *See also Dunn* v. *United States*, 284 U.S. 390, 393 (1932), *following Steckler* v. *United States*, 7 F.2d 59 (2d Cir. 1925). Had the jury in the state court here brought in a verdict of not guilty of kidnapping in the second degree under Count Three but guilty under Count Four, one would have a strong argument that the principles of these cases governed.

The difficulty with the district court's point of view, however, is that it rests on the proposition that "viewing the verdict herein as an entity and as a whole, I cannot find that the jury herein necessarily acquitted petitioner

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of kidnapping 2nd degree." In fact, however, the jury did just that, however erroneously and no matter how confused. The verdict was an express acquittal of kidnapping in the second degree.[10] It was rendered without correction by the trial court and without objection to the inconsistency by the prosecution. Under *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970), where it appears that the jury's verdict in the prior trial necessarily decided the issues raised in the second prosecution, collateral estoppel is constitutionally operative, embodied in the guarantee against double jeopardy. *See also United States* v. *Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974); *United States* v. *Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3349 (U.S. Dec. 17, 1974); Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 39-41 (1960).

It may be true that the appellant and his counsel failed to object when the trial judge declared a mistrial on the fourth count and discharged the jury. It would be the height of invention, however, to consider this as trial strategy amounting to consent which would preclude the defendant from invoking the double jeopardy clause upon a retrial. This is not a case where no verdict has been rendered and the entire first proceeding declared a mistrial. Here defendant cannot be deemed to have consented

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10 The district judge believed the jury viewed the second degree kidnapping charge under the third count, abduction for 12 hours with intent to injure or molest, as also including the 12 hours element. Such a view makes consistent the acquittal of second degree kidnapping under Count Three and failure to agree about second degree kidnapping under Count Four. Although Judge Port was "mindful of the dangers involved in 'conjecture as to the jury's mental gymnastics,' *United States* v. *Zane* [495 F.2d 683, 691 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3239 (U.S. Oct. 22, 1974)]," *United States ex rel. Rogers* v. *LaVallee*, No. 73-CV-459 at 7 n.10, to read in a 12 hour definition to the second degree kidnapping charge is conjecture and ignores the fact that at no time was such a charge given.

to a retrial because he did not insist that the judge refuse to accept the jury's statement that it could not agree on the last count after acquitting on the first three. *See generally* Mansfield, *J.*, concurring in *United States ex rel. Jackson* v. *Follette*, 462 F.2d 1041, 1052-53 (2d Cir.), *cert. denied*, 409 U.S. 1049 (1972). Indeed, such consent would have been unnecessary if the court, in its sound discretion, found that there was "manifest necessity" for the declaration of a mistrial. *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824); *Illinois* v. *Somerville*, 410 U.S. 1082 (1973).

In note 7 of the opinion in *United States* v. *Jenkins*, 43 U.S.L.W. at 4311, the Court said that "it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here." Here, of course, as to Count Three the proceedings did terminate with a verdict in the defendant's favor, even if as to Count Four they terminated in a mistrial. That seems to us to end the question. *United States ex rel. Jackson* v. *Follette, supra*, is not to the contrary for there there was no acquittal, nor even an implicit acquittal; the jury remained silent on the count on which the defendant was later convicted.

Judgment reversed; petition for the writ granted.

LUMBARD, *Circuit Judge* (dissenting):

I respectfully dissent.

I am not persuaded that the Double Jeopardy Clause, or the Supreme Court cases applying it, prohibited New York from again trying James Rogers for kidnapping in the first degree—described in count four of the indictment as abduction resulting in the death of sixteen-month-old

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Appendix A.

Delia Mott. In contrast to the majority, which focuses on the not-guilty verdicts under count three,[1] for me the determinative consideration is that Rogers' first trial ended in a hung jury, deadlocked over whether Rogers was guilty of abduction resulting in death or even simple abduction, both of which were charged under count four.

The first trial took fifteen days. The jury deliberated two days. On the second day of deliberations, the jury returned not guilty verdicts on counts one, two,[2] and three, and at the same time announced its deadlock on count four. The jury then continued deliberations on count four for several hours. Finally, it returned to court still deadlocked, and the judge declared a mistrial on count four, without objection by defense counsel.

As a starting point, under this Circuit's decision in *United States* v. *Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3239 (U.S., Oct. 22, 1974), it is clear that had the jury at Rogers' first trial broken its deadlock and returned a guilty verdict under count four, of either abduction resulting in death or simple abduction, this guilty verdict would have withstood an attack based on double jeopardy, res judicata, or collateral estoppel, notwithstanding the not-guilty verdict entered hours earlier by the same jury with respect to the subsidiary charge of simple abduction under count three. See also *Dunn* v. *United States*, 284 U.S. 390 (1932). As detailed in *Zane*, courts have been unwilling to upset allegedly "inconsistent" jury verdicts by speculation as to whether they might have been the result of compromise or mistake. In the present case, one reasonable explanation for the

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1 Count three charged abduction for more than twelve hours with intent to injure the victim or to violate the victim sexually. Simple abduction was a subsidiary charge under count three, as it was under count four.

2 Count one charged felony murder, and count two charged murder in the first degree.

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acquittal of simple abduction under count three and the deadlock under count four, is that the jury may have misunderstood the precise elements of simple abduction under count three. It may have thought that simple abduction under count three included the time element of the primary charge (twelve hours) or some requirement of an intent to injure. Alternatively, the jury may have thought that one of the two charges of simple abduction was surplusage, and by acquitting Rogers under all of count three, it did not intend to eliminate simple abduction as charged under count four from its further deliberations, not to mention the primary charge under count four of abduction resulting in death. Another possibility is that the jury simply wanted to focus on that count (four) where it felt there was the greatest possibility of agreement on a guilty verdict.

This case differs, however, from *Zane* in that the jury returned after completing its second day of deliberations, still deadlocked on count four, and the court declared a mistrial. Thus, unlike *Zane*, Rogers' subsequent conviction of abduction resulting in death came only after a *second trial*, which meant that Rogers was again "subject-[ed] to embarrassment, expense and ordeal and compell[ed] to live in a continuing state of anxiety and insecurity"—a harm against which the Double Jeopardy Clause was intended to protect in certain situations. *United States* v. *Jenkins*, 43 U.S.L.W. 4309, 4312 (U.S., Feb. 25, 1975).

But the Double Jeopardy Clause does not bar all reprosecutions. As the Supreme Court noted in *Jenkins*, it is "of critical importance whether the proceedings terminate in a mistrial as they did in the *Somerville*[3] line of cases, or in the defendant's favor . . ." 43 U.S.L.W.

3 *Illinois* v. *Somerville*, 410 U.S. 458 (1974).

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at 4311 n.7. The *Somerville* line of cases referred to by the court holds that a retrial is not barred by the Double Jeopardy Clause where a court has declared a mistrial because there was a "manifest necessity" for such action. One well-established situation where retrial is permitted is where a jury has become deadlocked after extensive deliberations and the trial court concludes that justice would not be served by pressuring the jury to reach a verdict one way or the other. See *Illinois* v. *Somerville*, 410 U.S. at 461-63; *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824); *United States* v. *Goldstein*, 479 F.2d 1061, 1068-69 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973). Indeed, to my knowledge, prior to this case, the Double Jeopardy Clause has not been held to be a bar to a retrial of counts regarding which a jury has failed to agree and where the trial judge has properly exercised his discretion in declaring a mistrial.

There is no indication here that the trial judge abused his discretion in determining that the ends of justice would best be served by a new trial, rather than by forcing continued deliberations until the deadlock was broken. See *United States* v. *Goldstein, supra.* The jury here had deliberated two days, following a fifteen-day trial, and was still unable to reach a verdict on count four. Moreover, the defendant made no objection to the declaration of a mistrial.

The majority, however, claims that this case does not fall within the *Somerville* line of cases. It finds that the acquittal of Rogers on count three was sufficient to bar reprosecution on count four, despite the fact that it would not have barred a conviction by the initial jury on count four. However I find no valid reason to distinguish the present case from the usual situation where a retrial is permitted on the counts on which a jury has been unable

to agree. Rogers' trial did not terminate in his favor; he was still very much in jeopardy of conviction for abduction resulting in death or simple abduction. To focus solely on the answer of "not guilty" to the subsidiary charge of simple abduction under count three is to ignore the fact that in virtually the same breath the foreman stated that the jury was deadlocked not only on simple abduction as charged under count four, but on the primary charge under count four of kidnapping resulting in death. The jury even continued its deliberations on count four alone, only to return to court a second time, still deadlocked, at which point the judge declared a mistrial. There is no way in which it can be said in these circumstances that the jury had determined that Rogers had not committed even simple abduction. Reprosecution of Rogers could not possibly deprive him of the benefit of favorable factual findings below.[4]

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4 *Green* v. *United States*, 355 U.S. 184 (1957), relied upon by the majority, does not control the present case. Defendant Green was initially convicted of second degree murder, with the jury returning no verdict on the related charge of first degree murder. After Green successfully appealed his conviction of second degree murder, the government retried him on murder in both the first and second degrees.

In finding that the Double Jeopardy Clause barred reprosecution of Green for murder in the first degree, the Court stated that the great majority of cases in this country have regarded a jury verdict like that returned at Green's first trial, as an implied acquittal of murder in the first degree. In addition, the Court found that the retrial did not fall within *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), because there was no "manifest necessity" for subjecting Green to a second trial on first degree murder. The first jury had had a full opportunity to return a verdict on that count, and no extraordinary circumstances appeared which prevented it from doing so. Moreover, Green had not consented to the dismissal of the first jury.

In the present case, however, the judge quite properly declared a mistrial when the jury deadlocked over count four after two days of deliberations. Moreover, I do not view the jury's conduct at Rogers' first trial as amounting to even an implied acquittal of simple abduction. At the same time that the jury announced the not guilty verdicts under count three, it announced that it was deadlocked over count four which

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In these circumstances, I do not believe that the Double Jeopardy Clause barred reprosecution of Rogers for the crime of kidnapping in the first degree (kidnapping resulting in death). Accordingly I would affirm the order of the district court denying Rogers' petition for a writ of habeas corpus.

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charged abduction resulting in death and simple abduction. It thereafter continued to deliberate on count four, still failing to reach a verdict, at which point the judge declared the mistrial.

The majority's reliance on *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970), also seems misplaced. I do not believe that the jury at Rogers' first trial *necessarily* decided the factual issues raised in Rogers' retrial under count four. See Majority Op. at 9. Although the jury found Rogers not guilty under count three of simple abduction, it continued to consider that very charge as well as abduction resulting in death, under count four, and failed after further deliberations to reach a verdict.

APPENDIX B.

Opinion & Order of the District Court, August 29, 1974.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

73-CV-459

UNITED STATES ex rel. JAMES W. ROGERS,
Petitioner,

v.

J. EDWIN LA VALLEE, Warden, Clinton Prison, Dannemora, N. Y.,
Respondent.

EDMUND PORT, Judge

Memorandum—Decision and Order

An earlier application by the same petitioner for a writ of habeas corpus upon the same grounds as presented herein was dismissed by me for factual insufficiency by Memorandum-Decision and Order dated August 31, 1971.[1] On appeal to the Second Circuit, the action was remanded to this court with directions to dismiss the petition, without prejudice, for the failure to exhaust state court remedies. *United States of America ex rel. Rogers* v. *LaVallee,* 463 F.2d 185 (2d Cir. 1972).

Upon remand, I issued an Order on Mandate dated August 3, 1972, dismissing the action for failure to exhaust

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[1] *United States ex rel. Rogers* v. *LaVallee,* 71-CV-403 (N.D. N.Y. 1971).

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state court remedies. Petitioner then sought relief by a collateral proceeding in the Kings County Supreme Court, which was denied in an opinion by Honorable Vincent D. Damiani.[2] The Appellate Division, Second Department, denied leave to appeal on April 4, 1973.[3] Having exhausted state remedies, the petitioner filed the instant federal petition for habeas corpus in this court.

State court records were then obtained and examined, counsel assigned,[4] and time afforded for briefing and oral argument; the action was submitted, by stipulation, on the basis of oral argument, briefs, and the state court records. Its resolution has not been easy because, as indicated by Judge Feinberg:

> the crime involved is so repulsive,[5] the issue of state-federal relationship so delicate, and the double jeopardy claim so unusual and not without difficulty. *United States ex rel. Rogers* v. *LaVallee*, supra, at p. 187.

In addition, insofar as counsels' and this court's research indicates, the petition herein presents a case of first impression and is *sui generis* factually.

The factual background surrounding the petitioner's trial, retrial, and appellate proceedings are set forth in the

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[2] *People* v. *Rogers*, ind. no. 217/1969 (Sup.Ct. Kings Co. Feb. 8, 1973).

[3] A determination that is puzzling and inexplicable in view of the unique and difficult questions presented herein.

[4] For various reasons, the court was obliged to appoint three successive attorneys; one Cornell Law School professor and two Syracuse University College of Law professors, to represent the petitioner herein.

[5] The petitioner was charged with kidnapping a 19-month-old infant girl, sexually assaulting her, murdering her, and disposing of her nude body in a garbage can behind a supermarket.

Second Circuit's decision and will not be restated herein in the interest of brevity. See *United States ex rel. Rogers* v. *LaVallee*, supra, at pp. 185-86. Each of the two contentions presented herein will be discussed separately.

DECLARATION OF MISTRIAL SUA SPONTE BY TRIAL JUDGE

Petitioner claims that the judge at his first trial acted improperly when he declared a mistrial, *sua sponte*, and that his second trial and conviction was prohibited by the Double Jeopardy Clause pursuant to *United States* v. *Jorn*, 400 U.S. 470 (1971). The Second Circuit indicated in its initial consideration of this case that this particular claim was "a weak one on the merits." *United States ex rel. Rogers* v. *LaVallee*, supra at p. 187. I am in accord. See *United States ex rel. Rogers* v. *LaVallee*, 71-CV-403 (N.D.N.Y. 1971).

From the state records in this action, it appears that the trial lasted approximately fifteen days and that the jury deliberated for approximately two days after being sequestered overnight. During its deliberations, the jury was given additional instructions on four occasions and twice stated that it could not agree as to the fourth count of the indictment. After polling the jury, the trial judge, on his own motion and without objection from either the People or the defendant,[6] declared a mistrial as to the

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[6] It is uncontroverted that the defendant or his counsel failed to object to the declaration of a mistrial. In fact, the defendant may have consented to the same. The brief of the People in opposition to petitioner's application for a writ of certiorari to the Supreme Court states on page 15 thereof: "The Clerk's minutes state as follows: 'Both sides consent to a mistrial and the Court so orders it.'" This court has been unable to find that quotation from the Clerk's minutes in the state court records herein. Of course, if, *consent* was so given that would resolve this issue against the petitioner. See *United States* v. *Goldstein*, 479 F.2d 1061, 1066 (2d Cir. 1972).

(footnote continued on following page)

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fourth count of the indictment and restored that count to the trial calendar.

United States v. *Jorn*, supra, holds that before a trial judge, *sua sponte*, declares a mistrial, he should exercise a sound and scrupulous discretion to assure that there is a manifest necessity for that action and that the ends of public justice would not be served by a continuation of deliberations. And see *United States* v. *Castellanos*, 478 F.2d 749 (2d Cir. 1973). Ordinarily, the retrial of an accused after a mistrial because the jury is unable to agree is not a denial of the constitutional right against twice being placed in jeopardy. See, e.g., *Green* v. *United States*, 355 U.S. 184 (1957); *Wade* v. *Hunter*, 336 U.S. 684 (1949); and *United States* v. *Goldstein*, 479 F.2d 1061, 1069 (2d Cir. 1973). This is particularly true when the defendant has failed to object to the judge's action. See *United States* v. *Phillips*, 431 F.2d 949 (3rd Cir. 1970).

In the instant case it is clear that the defendant did not object to the declaration of mistrial; further, he does not show that he was not given an opportunity to object as was the case in *Jorn*, supra.

For all the above resons and based upon all the facts and circumstances disclosed upon an examination of pages 1575-1598 of the trial minutes[7] upon petitioner's first trial,

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(footnote continued from preceding page)

In connection with the failure to object to the mistrial by defendant or his counsel, it should be noted that petitioner was not a novice to criminal proceedings and trials. The petitioner had been arrested on at least eight previous occasions, including the arrest for and full trial on a charge of raping and strangling to death his own nine-year-old daughter; he was acquitted of this charge after trial. See *Sentencing Minutes* of July 14, 1970 at pp. 16-19.

[7] Containing the record of the trial proceedings from the commencement of the jury's deliberations to the judge's declaration of a mistrial.

and according all these factors their proper weight,[8] I hold as a matter of law that petitioner's double jeopardy rights were not infringed by reason of the trial judge's declaration of a mistrial *sua sponte* upon his first trial.

ACQUITTAL OF KIDNAPPING 2ND DEGREE ON FIRST TRIAL

Petitioner was originally indicted in a four-count indictment in connection with the kidnapping and death of a nineteen-month-old baby girl, containing the following counts: (1) felony murder 1st degree; (2) common-law murder; (3) kidnapping 1st degree [abduction plus restraint for more than twelve hours with intent to inflict physical injury and to violate and abuse sexually]; and (4) kidnapping 1st degree [abduction plus death of the victim during abduction].

The problem in this case arises out of the manner in which the judge charged as to the lesser included offense of 2nd degree kidnapping. His charge required that the jury consider 2nd degree kidnapping as to the count of kidnapping 1st contained in count 3 and then consider 2nd degree kidnapping separately in connection with the charge of 1st degree kidnapping in count 4.[9]

He charged the jury that, if they found defendant not guilty of count 3 as to 1st degree kidnapping, to consider the charge of 2nd degree kidnapping. In spite of the fact that count 4, charging 1st degree kidnapping, resulting in the death of the victim, includes of necessity abduction, the jurors were instructed that, if they found the defendant not guilty of 2nd degree kidnapping as a lesser included offense in count 3, to go on and consider kidnapping 1st as

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[8] See, e.g., *United States* v. *Goldstein*, 479 F.2d 1061, 1068-69 (2d Cir. 1973).

[9] The pertinent part of the charge is set out in full as an appendix.

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charged in count 4. The court then went further and charged the jury that, if they found the defendant not guilty as to kidnapping 1st as charged in count 4, they should then consider kidnapping 2nd as a lesser included offense of count 4. This was repeated in substance on two more occasions in response to requests for clarification from the jury. At no time did the defendant object.

The jury reported that it had found petitioner not guilty of counts 1, 2 and 3 [including both 1st and 2nd degree kidnapping], but reported that it was unable to agree on the charges of count 4 encompassing both 1st and 2nd degree kidnapping. After sending the jury back for further deliberations, which proved fruitless, the trial judge declared a mistrial as discussed earlier herein. At petitioner's second trial, he was found guilty of 1st degree kidnapping as stated in count 4 of the indictment.

Petitioner argues that because the jury on his first trial acquitted him of the lesser included charge of kidnapping 2nd degree [abduction only] under count 3 of the indictment, then the People were prohibited from retrying him on count 4 of the indictment for kidnapping 1st degree as abduction was an essential element of that offense; by so retrying and convicting him, petitioner claims that his double jeopardy protection was violated.

The unique and vexatious factual situation presented by this petition constitutes, as noted by the Second Circuit in a similarly unique double jeopardy case:

> a case that is sui generis, not controlled by any Supreme Court case on its facts, and not capable of simple resolution either on an historical or logical basis. Without disregarding the teachings of history or of the cases, we come to a point where we must weigh on a fine scale the competing interests of the public and petitioner. We must strike a balance between fairness to society in obtaining a verdict on a

> proper indictment and the avoidance of undue vexation to the defendant by a retrial. . . . *United States ex rel. Jackson* v. *Follette,* 462 F.2d 1041, 1049 (2d Cir. 1972).

If petitioner had simply been acquitted of kidnapping 1st degree under count 3 of the indictment and then later convicted of kidnapping 1st degree under count 4 of the indictment, the complex constitutional problem presented herein would not be present, as the elements of each kidnapping 1st degree charge were markedly different. The problem herein arises from the fact of his acquittal of kidnapping 2nd degree under count 3 of the indictment.

Petitioner contends that this court should recognize his acquittal of kidnapping 2nd degree under count 3, but at the same time disregard the jury's disagreement and their inability to come to a verdict on the same crime as charged in count 4. I am of the opinion, as was Judge Damiani in his state court determination, that the jury's verdict must be considered in its entirety and as a whole; to do otherwise would be to ignore entirely the clear fact that the "jurors were in effect saying in the same breath, 'we find the defendant not guilty' and 'we cannot agree.'" *People* v. *Rogers,* ind. no. 217/1969 (Sup.Ct. Kings Co. Feb. 8, 1973) at p. 6.

While making no effort to define what was in either the defendant's, the trial judge's, the counsels' or the jurors' minds,[10] there is little if anything to indicate that any of them considered the jury's verdict on count 4 to be anything but what it was: a disagreement on count 4 as to kidnapping 1st and the lesser included offense of kidnapping 2nd under that count. Under the circumstances

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[10] Being mindful of the dangers involved in "conjecture as to the jury's mental gymnastics". *United States* v. *Zane, supra,* at p. 691.

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of this case "[t]o say that [the jury] . . . acquitted [Rogers of 2nd degree kidnapping] would be pure speculation."[11] Under the charge, the lesser included offense of 2nd degree kidnapping became part of the major offense to which it was tied; the 2nd degree kidnapping as the lesser included offense of count 3 differed from 2nd degree kidnapping as the lesser included offense of count 4 as much as count 3 differed from count 4. The charge, in effect, told the jurors the abduction which comprised the lesser included offense under count 3 was an abduction of at least twelve hours, while abduction as the lesser included offense under count 4 had no time restrictions. (See appendix.)

I am of the opinion that the jury's disagreement as to count 4 is entitled to at least as much weight as is the acquittal under count 3; the end result being that the jury brought in no more than a confused, inconsistent and repugnant verdict. It is black-letter law than even plainly inconsistent jury verdicts, rendered simultaneously, are the jury's prerogative and that such verdicts have no estoppel or res judicata effects. *United States* v. *Zane,* 495 F.2d 683 (2d Cir. 1974). *Zane,* supra, apparently extends this basic rule to inconsistent verdicts on separate counts rendered at different times under one indictment. See 495 F.2d at pp. 690-91. The policy reasons for not disturbing inconsistent verdicts are amply set forth in *Zane,* supra, at 690-91.

In the confused verdict rendered herein, it is obvious, to this court at least, that the jury did not render a dispositive, adequate or accurate finding as to petitioner's guilt or innocence of kidnapping 2nd degree. Accordingly, jeopardy should not attach to the jury's determination under count 3 nor should the doctrine of collateral estop-

[11] 462 F.2d at 1052, Mansfield, C. J. concurring.

pel[12] have prevented the People from retrying and convicting petitioner under count 4.

Further, it must be remembered that the petitioner and his counsel failed to object when the trial judge declared a mistrial, thereby allowing the jury's confused and inconsistent determination to stand uncorrected. It has been suggested that the consent of a defendant, or trial strategy amounting to such consent, may preclude the defendant from invoking the Double Jeopardy Clause upon a retrial. See the concurring opinion of Mansfield, Circuit Judge, in *United States ex rel. Jackson* v. *Follette,* supra, at pp. 1052-53.

While concerned with a factually different situation than is presented herein, Circuit Judge Lumbard's dissent in *United States* v. *Jenkins,* 490 F.2d 868, 884 (2d Cir. 1973)[13] presents considerations and concerns which are applicable herein:

> Simply stated, it is my view that the Double Jeopardy Clause is not an abstract rule, but one that should be adapted and applied in light of the totality of circumstances of each particular case. As Judge Friendly's thoroughgoing history of the Clause reveals, its evolution has been clouded with contradictions, inconsistencies, and uncertainties. It would be a se-

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[12] See *Ashe* v. *Swenson,* 397 U.S. 436 (1970). For the doctrine of collateral estoppel to be operative, it is the defendant's burden to show that the jury's verdict in the prior trial *necessarily* decided the issues raised in the second prosecution. *United States* v. *Gugliaro,* docket no. 74-1378 at p. 4880 (2d Cir. July 19, 1974); *United States* v. *Tramunti,* docket no. 74-1398 at p. 4830 (2d Cir. July 12, 1974). For all of the reasons mentioned and discussed in this opinion and viewing the verdict herein as an entity and as a whole, I cannot find that the jury herein necessarily acquitted petitioner of kidnapping 2nd degree.

[13] *Jenkins* contains an exhaustive and complete analysis, historical and current, of the Double Jeopardy Clause and its origins.

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rious mistake slavishly to adhere to a rigid application of this fifth amendment protection. An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice.[7] Only last term, the Supreme Court in *Illinois* v. *Somerville,* 410 U.S. 458 (1973), rejected the notion that technical errors resulting in a mistrial should bar reprosecution. In such cases, the "ends of public justice" demand that "the purpose of law, to protect society from those guilty of crimes [not] be frustrated by denying courts power to put the defendant to trial again." 410 U.S. at 470.

Weighing and considering the conflict between the petitioner and the People of the State of New York herein, the aims and purposes of the Double Jeopardy Clause, and after careful analysis of the peculiar and unique factual situation presented by the instant petition, and for all the other reasons mentioned herein, I hold, as a matter of law, that petitioner's rights under the Double Jeopardy Clause were not violated by reason of his retrial and conviction of Kidnapping 1st degree.

For the reasons herein it is

ORDERED, that the petition herein be and the same hereby is denied and dismissed. The Clerk is directed to file the

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[7] For quite some time, legal commentators have urged a more flexible analysis in determining whether the Double Jeopardy Clause is applicable to the circumstances of a particular case. *See generally* Mayers & Yarborough, *Bix Vexari:* New Trials and Successive Prosecutions, 74 Harv.L.Rev. 1 (1960); Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965).

papers herein without the payment of fees, and leave to proceed in forma pauperis is granted. For the reason that this petition presents a case of first impression and in view of the unique and novel facts comprising the claims herein, a certificate of probable cause is hereby granted without further application; the Clerk shall file a notice of appeal if the same shall be forwarded to him: c/o United States District Court, Federal Building, Utica, New York, 13503.

EDMUND PORT
United States District Judge

Dated: August 29, 1974 Auburn, New York

N.B. This court expresses its appreciation to Mr. Joseph E. Parisi, Chief Clerk, Criminal Term of the Kings County Supreme Court, Civic Center at Montague Street, Brooklyn, New York, 11201 for his courteous cooperation in forwarding to this court petitioner's state court records, both in connection with his direct appeal and his New York State collateral proceedings.

All of the state court records in this case are being returned directly by this court to Mr. Perisi.

APPENDIX C.

Decision of the State Court on Respondent's Post conviction Application.

SUPREME COURT

KINGS COUNTY (CRIMINAL TERM, PART 12)

THE PEOPLE OF THE STATE OF NEW YORK

vs.

JAMES W. ROGERS

MEMORANDUM

By DAMIANI, J.

Dated February 8, 1973

Indictment No. 217/1969

Defendant is presently confined in State Prison where he is serving a 20-year to life sentence after having been convicted in this court on May 15, 1970 of kidnapping in the first degree. In July 1971 defendant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of New York alleging that his conviction violated his constitutional rights against double jeopardy. The District Court by order dated August 31, 1971 denied the petition on the ground of insufficient factual support for the alleged claims. Thereafter, counsel was assigned and defendant was granted leave to appeal to the Circuit Court of Appeals for the Second Circuit. On the appeal, the matter was remanded to the District Court for dismissal of the petition in order to per-

mit exhaustion of state remedies (*U.S. ex rel. James W. Rogers* v. *LaVallee,* 463 F. 2d 185 [2d Cir. 1972]).

Thereafter, defendant filed the instant petition for a writ of habeas corpus in the Supreme Court of Dutchess County which was referred to this court on the ground that the issues raised herein fall within the provisions of Article 440 CPL, and should be determined in the court of conviction.

The relevant facts prior to defendant's conviction are as follows:

In 1969, the grand jury of Kings County returned an indictment against defendant for the abduction and death of a 16-month old child. Defendant was charged in four separate counts with (1) Felony Murder; (2) Common-law Murder; (3) Kidnapping in the First Degree (*abduction* plus restraint for more than 12 hours with intent to inflict physical injury and violate her sexually); and (4) Kidnapping in the First Degree (*abduction* plus death of the victim during abduction). Under Count 3 and Count 4, the trial court also charged the crime of Kidnapping in the Second Degree (abduction).

At the trial, after twice requesting clarifying instructions by the court with respect to the charges of first and second degree kidnapping, the jury announced its verdict of not guilty on Count 1, Felony Murder; Count 2, Common-law Murder; and Count 3, both as to Kidnapping in the First and Second Degree. However, as to Count 4, the jury stated it was deadlocked on the charges of both first and second degree kidnapping. The trial judge directed further deliberation on the charges under count 4, but the jury was still unable to agree on a verdict. Thereupon, the court, without objection on the part of the defedant, polled the jury, determined it did "not agree" and restored the case to the calendar for a new trial on Count 4.

Upon the second trial in May 1970, defendant was found guilty of first degree kidnapping as charged in the fourth

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count. His conviction was affirmed without opinion by the Appellate Division (*People* v. *Rogers,* 36 A D 2d 1024). Leave to appeal to the Court of Appeals was denied on July 6, 1971 and the Supreme Court of the United States denied certiorari on February 28, 1972 (405 U.S. 956).

In his habeas corpus petition to the United States District Court, defendant claimed his conviction was invalid on two grounds. Firstly, he contended that since he was acquitted by the jury at the first trial of the charge of second degree kidnapping (abduction) under the third count, the prosecution was prohibited by the double jeopardy clause of the Constitution from later trying him for first degree kidnapping on the fourth count. Secondly, he claimed the court at the first trial improperly declared a mistrial on the fourth count and that the second trial was prohibited on the same ground of double jeopardy.

It appears that although at various times during the proceedings on the second trial and on appeal, defendant raised the issue of double jeopardy, he claims "the issue was never properly presented nor understood for the reason that the transcript of the charge to the jury [at the first trial] . . . was not available." (Pet. p. 3). Apparently, the transcript was first produced in the Circuit Court pursuant to an order of that court dated December 2, 1971. The Circuit Court in its opinion stated that the "state courts here were never fully advised and aware that the trial judge at appellant's first trial had instructed the jurors that they could consider whether appellant was guilty of the lesser offense of second degree kidnapping or that the jury actually found appellant innocent of that crime." (p. 187).

The court alluded to the fact that defendant did raise a double jeopardy issue in the state courts and expressed the opinion that because the crime was "so repulsive, the issue of state-federal relationship so delicate, and the double jeopardy claim so unusual and not without difficulty,"

that the state courts should have the opportunity of making the first determination on a full record. (p. 187.)

With respect to the defendant's second claim that the declaration of a mistrial on the Fourth Count was improper, the court, although of the belief that the claim was a "weak one," considered that exhaustion of state remedies was also the preferable course on this ground.

On January 3, 1973 the instant petition was referred to the Justice of this court who presided at the second trial, who disqualified himself on the ground that he was "in no position to make a determination objectively." In accordance with the rules of this court, the matter was referred to the undersigned.

On oral argument held on January 22, 1973, counsel agreed that only a question of law was involved herein and that no factual hearing was required.

It is defendant's contention that his acquittal on the Third Count "should have terminated the case for all purposes since it was an acquittal of kidnapping in the first degree and of kidnapping in the second degree and the jury should have had no need to deliberate on the fourth count." (Brief p. 6).

There is no merit to defendant's contention concerning his acquittal of kidnapping in the first degree. Defendant was charged under Count 3 with kidnapping in the first degree pursuant to subd. 2(a) of Sec. 135.25 of the Penal Law, i.e., abduction plus restraint for more than twelve hours with intent to inflict physical injury and violate the victim sexually.

Under Count 4 defendant was charged with kidnapping in the first degree pursuant to Subd. 3 of the same section of the Penal Law, i.e., abduction where death results.

Obviously, defendant's acquittal of kidnapping in the first degree under Count 3 could not preclude defendant's retrial under Count 4 in view of the fact that the elements of the crimes charged in the indictment pursuant to above

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subdivisions of the statute, are different and require different proof.

Defendant's contention that his acquittal of kidnapping in the second degree (abduction) precluded his retrial on Count 4 for kidnapping in the first or second degree, presents a novel and more vexatious issue. If defendant was *in fact* acquitted of kidnapping in the second degree (abduction), then he could not be tried again for kidnapping in the first degree under Count 4 (abduction where death results) or kidnapping in the second degree (abduction).

The difficulty with defendant's position, however, is that it cannot be said with certainty that the jury acquitted defendant of kidnapping in the second degree (abduction).

In fairness to the People, the verdict of the jury must be viewed in its entirety. The jury's verdict of not guilty of abduction under Count 3 should not be isolated and considered separately from the remainder of the verdict. The fact is that the jury returned with a verdict of not guilty as to kidnapping in the second degree (abduction) under Count 3, and at the same time disagreed as to the same crime under Count 4. Concerning abduction, the jurors were in effect saying in the same breath, "we find the defendant not guilty" and "we cannot agree." This was a confused or "repugnant" verdict (see *People* v. *Pugh,* 36 A D 2d 845).

Defendant emphasizes the verdict under Count 3 and ignores the companion verdict under Count 4. The disagreement under Count 4 cannot be ignored any more than the acquittal under Count 3. Consequently, when the verdict is taken as a whole, it cannot be said that defendant was in truth and in fact acquitted of abduction at the first trial. At most, the jury rendered a confused or "repugnant" verdict.

While it is true that the trial judge did not disturb the verdict of acquittal on Count 3 or instruct the jury to

reconsider its verdict under Counts 3 and 4, but instead found a "disagreement" and ordered a retrial of Count 4, defense counsel made no objection to the court's action. The result was that a "repugnant" verdict was permitted to stand by all concerned and defendant should not be permitted to interpret the verdict as one of actual acquittal. To do so would be pure speculation which should not be the basis for a claim of double jeopardy.

It is defendant's second contention that the trial court's declaration of a mistrial without defendant's consent on the Fourth Count was improper, so that defendant was subjected to double jeopardy on the second trial. It is undisputed, however, that neither defendant nor his counsel interposed any objection to the polling of the jury, the determination by the court of the jury's disagreement, the court's discharge of the jury and restoration of the case to the trial calendar. Moreover, the court records indicate that after the jury was selected the case was on trial approximately 11 days. The jury deliberated for approximately two days after being sequestered overnight. During its deliberations the jury was given further instructions on four occasions and twice stated it could not agree. Under all the circumstances of this case, it is my opinion that there was no abuse of discretion on the part of the trial judge in declaring a mistrial.

Accordingly, defendant's motion is in all respects denied.

The Clerk is directed to prepare an order in accordance with this decision and to serve a copy of this order, when signed, together with a copy of this decision, upon the district attorney, the attorney for the defendant, and the defendant at the place where he is presently incarcerated.

J. S. C.

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